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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/576,921

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Sebastian Koltzenburg

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9858

45473

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12/22/2010

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EXAMINER

ALSTRUM ACEVEDO, JAMES HENRY

ART UNIT

PAPER NUMBER

1616

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/576,921	<b>Applicant(s)</b> KOLTZENBURG ET AL.	
	<b>Examiner</b> JAMES H. ALSTRUM ACEVEDO	<b>Art Unit</b> 1616	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 14 December 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 24-57 is/are pending in the application.
- 4a) Of the above claim(s) 42-48 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 24-41 and 49-57 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>11/30/10</u> . | 6) <input type="checkbox"/> Other: _____  |

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### DETAILED ACTION

**Claims 24-57 are pending.** Applicants previously cancelled claims 1-23. Applicants amended claims 24, 39-41, and 49-55 in the claim set submitted on November 30, 2010. Applicants amended claims 42 and 44-46 in the claim set submitted on December 14, 2010. **Claims 42-48 remain withdrawn from consideration at this time.** Receipt and consideration of Applicants' amended claim sets, new IDS, and arguments/remarks submitted on November 30, 2010 and/or December 14, 2010 are acknowledged.

### Election/Restrictions

Applicant's election without traverse of Group I (claims 24-41 and 49-57) and species elections of (i) AMPS monomer as the compound of Formula I, (ii) phenoxyethyl acrylate as the compound of Formula II, and n-butyl acrylate as the compound of Formula IIb in the reply filed on June 23, 2010 is acknowledged.

**Claims 42-48 are withdrawn from further consideration** pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on June 23, 2010. **The species election of specific monomers of formulae I, II, IIb, and IIc is withdrawn**, but the restriction requirement is maintained.

### Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

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### **Specification**

The lengthy specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which applicant may become aware in the specification.

### **Response to Arguments**

Applicant's arguments, see pages 16-18 of the remarks, filed November 30, 2010, with respect to the rejection of (i) claims 24, 26, and 38-39 under §102(b) and (ii) claims 24, 26, 29-33, and 38-41 under §103(a) have been fully considered and are persuasive. The rejections of (i) claims 24, 26, and 38-39 under §102(b) and (ii) claims 24, 26, 29-33, and 38-41 under §103(a) have been withdrawn. Applicants' amendments to claim 24 overcame the rejection under §102(b) and Applicants' statement consistent with the requirements of §103(c) in combination with Applicants' claim amendments has overcome the rejection under §103(a).

### **Double Patenting**

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting

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ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

**Claims 24-41 and 49-57 remain provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 4, 7-11, 13, and 20-21 of copending Application No. 11/918,522 (copending ‘522) in view of Suarez-Cervieri et al. (US 2005/0032903).**<sup>1</sup> Independent claim 24 of the instant application is described above. Independent claim 1 of copending ‘522 claims a preparation comprising (a) at least one fungicidally active compound selected from the group of conazoles, (b) at least one further crop protection agent (active compound 2), and (c) at least one copolymer constructed from ethylenically unsaturated monomers selected from at least one monomer M1 having a sulfonic acid group and at least one neutral monomer M2. The primary differences between the rejected claims of the instant application and the cited independent claim of copending ‘522 are that independent claim 1 of copending ‘522 does not (i) depict any monomer formulae, (ii) mention that the second active agent is a strobilurin, such as pyraclostrobin, and (iii) does not specify that the formulations may be in the form of solids, dispersions, or solutions. Dependent claims 3-4 of copending ‘522 demonstrate that contemplated active compound 2 compounds include strobilurins, such as pyraclostrobin. Dependent claim 7 of copending ‘522 demonstrates that a contemplated modification of independent claim 1 of copending ‘522 was the inclusion of

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<sup>1</sup> Copending ‘522 was allowed on December 17, 2010. This rejection was modified to reflect amendments to the claims of copending ‘522 made on September 24, 2010. Once copending ‘522 issues as a patent this rejection will cease to be provisional.

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sulfonic acid containing monomers, such as AMPS, which is encompassed by formula I depicted in claim 7 of copending '522. Dependent claim 10 of copending '522 demonstrates that a contemplated modification of independent claim 1 of copending '522 was to include monomers of formula M2a, such as phenyl-C<sub>1</sub>-C<sub>4</sub> alkanol esters of acrylic acid (e.g. phenoxyethyl acrylate). Regarding difference (iii) above, the teachings of Suarez-Cervieri establish that it was conventional to formulate antifungal compositions in the form of solutions, dispersions, solids, etc. Thus, an obvious modification of independent claim 1 of copending '522 would include obtaining said claimed composition in the form of dispersions, solutions, or solids. Therefore, a person of ordinary skill in the art at the time of the instant invention would have found claims 24-41 and 49-57 prima facie obvious over claims 1, 3-4, 7-11, 13, and 20-21 of copending Application No. 11/918,522 (copending '522) in view of Suarez-Cervieri et al. (US 2005/0032903).

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### **Response to Arguments**

Applicant's arguments filed November 30, 2010 and December 14, 2010 have been fully considered but they are not persuasive. Applicants did not traverse this rejection, but rather argued that if this is the only rejection remaining that the rejection should be withdrawn. It is not be proper to withdraw the instant rejection because copending '522 is reasonably expected to issue as a U.S. patent before the instant application would due to the mailing of a notice of allowance in copending '522 on December 17, 2010. The rejection is maintained.

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### **Conclusion**

**Claims 24-41 and 49-57 are rejected. Claims 42-48 are withdrawn. No claims are allowed.**

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to James H. Alstrum-Acevedo whose telephone number is (571) 272-5548. The examiner can normally be reached on M-F, ~10:00-6:00 and Saturdays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on (571) 272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/James H Alstrum-Acevedo/  
Patent Examiner, Art Unit 1616  
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J.H. Alstrum-Acevedo, Ph.D.